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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

JOSEPH C. O'NEILL,
Respondent.

Brief for Amicus Curiae

THE NATIONAL CONFERENCE OF
COMMISSIONERS ON UNIFORM STATE LAWS

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STATEMENT OF THE CASE.

The statement of the case in the Brief for the Petitioner sets out fully the facts of the case, and *Amicus* adopts that statement.

From the statement two questions are presented in this Court:

1. Does the provision of Section 942.02 of the Florida Statutes 1955, which is Section 2 of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which authorizes a Florida court

of record to order that a witness in Florida be taken into custody and delivered to an officer of a requesting state for the purpose of requiring such witness to attend a criminal proceeding or grand jury investigation in the requesting state, where the requesting state has adopted reciprocal legislation, violate the privileges and immunities clause of Article IV, Section 2, of the United States Constitution?

2. Does the Florida statute conflict with the privileges and immunities clause of the Fourteenth Amendment?

The statute requires as a condition precedent to the issuance of an order by the Florida court to take the witness into custody to be delivered to an officer of the requesting state, that the Florida judge find (1) that the witness is material and necessary, (2) that it will not cause undue hardship to the witness to be compelled to attend and testify in the proceeding or grand jury investigation, (3) that the proceeding or grand jury investigation has commenced or is about to commence, and (4) that the requesting state will give the witness protection from arrest and the service of civil and criminal process within the state. The statute further requires the requesting state to tender payment of ten cents a mile for each mile to be traveled and five dollars for each day that the witness is required to travel and attend as a witness. Florida Statutes 1955, Section 942.02. Since the finding of the Florida judge can be made only after notice and hearing at which the prospective witness is represented by counsel, the question becomes solely one of the power of the State of Florida to require an individual who is in Florida to be delivered to an officer of another state for the purpose of giving testimony in the requesting state.

ARGUMENT.

1. Section 942.02 of Florida Statutes 1955, which authorizes a judge in a Florida court of record to order that a witness be taken into custody and delivered to an officer of a requesting state for the purpose of requiring said witness to attend a criminal proceeding or a grand jury investigation in the requesting state when the requesting state has adopted reciprocal legislation, is not unconstitutional as in conflict with the privileges and immunities clause of Article IV, Section 2, of the United States Constitution.

The purpose of the clause which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" was to prevent any state from discriminating in favor of its citizens and against citizens of other states. When an individual who is a citizen of State A goes into State B to engage in any business activity, he is entitled to be treated the same as a citizen of State B. As stated by the Court in the *Slaughter-House Cases,* 16 Wall. 36, 77:

> "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

There is no different treatment of the Illinois citizen than would apply to a Florida citizen. Equality is the theme of the statute, for all within the jurisdiction of the State of Florida are subject to its terms.

Further, this cause does not purport to confer upon an individual coming into a state any substantive rights other than those enjoyed by the citizens of that state.

"At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights'; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.

"While this description of the civil rights of the citizens of the States has been quoted with approval, it has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." *Hague* v. *C.I.O.*, 307 U.S. 496, 511.

"The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States." *Toomer* v. *Witsell*, 334 U.S. 385, 395.

It is submitted that the statute involved in this case manifests a recognition by the State of Florida that criminal activity is a national problem.

2. The provision of Section 942.02, Florida Statutes 1955, is not unconstitutional because of a negative implication of the extradition clause of Article IV, Section 2, Clause 2 of the United States Constitution.

"A Person charged in any State with Treason, Felony or other Crime, who shall flee from Justice,

> and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

The Florida Supreme Court reasoned that since the Constitution expressly provides for extradition in "Treason, Felony or other Crime," this exception indicates that this may be the only basis for removal of an individual from the state to another state.

It is submitted that such implication should not be drawn from this exception. The framers of the Constitution were making sure that in this important area there would be a method of returning an alleged criminal to the scene of the crime for trial. This constitutional provision restated the practice existing before the adoption of the Constitution, under which criminals were returned to the state of the offense by principles of comity. *Kentucky* v. *Dennison,* 24 How. 66. In this case the Court held that the Governor of Ohio could not be compelled to turn over the fugitive, but that his compliance with the Constitution and the Act of Congress depended on his own fidelity. This express provision of the Constitution is left for its enforcement to principles of comity.

That it is not to preclude the interstate rendition of prisoners other than those within its exact terms is illustrated by the case of *Innes* v. *Tobin,* 240 U.S. 127, in which this Court sustained the power of the state of Texas to surrender to the Georgia authorities one who had not fled to Texas but who had been brought into Texas by extradition from the state of Oregon.

This provision of the Constitution does not prevent a state from using its power to require a witness to attend a criminal proceeding in another state. The principles of comity which form the basis of interstate rendition of

criminals can be extended to include important witnesses in criminal proceedings.

3. The provision of Section 942.02 of Florida Statutes 1955, which authorizes a judge of a Florida court of record to order a witness to be taken into custody and delivered to an officer of the requesting state for the purpose of assuring the witness's attendance at a criminal proceeding or grand jury investigation in a requesting state, where the requesting state has enacted reciprocal legislation, is not unconstitutional because it conflicts with the privileges and immunities clause of the Fourteenth Amendment.

The fundamental privilege or immunity asserted by the Respondent in this case is the right of free ingress or egress between states. *Amicus* concedes that this right is guaranteed to all citizens. The constitutional foundation of the right may be the fact that this is one nation.

> "The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. . . . That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. . . . In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established. . . .
>
> "But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to

assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." *Crandall* v. *Nevada,* 6 Wall. 35, 43, 44.

It is to be noted that emphasis is placed both on the right of the individual to go to the seat of government or to the seaports, and also on the right of the government to request him to go. He can be compelled to travel across state lines to fulfill this obligation as a citizen of his nation.

The constitutional barrier to state power to impede free ingress and egress of citizens may be found in the commerce clause, Article I, Section 8, of the Constitution, *Edwards* v. *California,* 314 U.S. 160, or in the privileges and immunities clause of the Fourteenth Amendment.

> "The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference." *Edwards* v. *California,* 314 U.S. 160, 178 (concurring opinion).

Freedom of movement has been eloquently expounded by Professor Zechariah Chafee in *Three Human Rights in the Constitution,* pp. 162-213.

That this right exists does not lead to the conclusion that it is an absolute, for all rights guaranteed in the Constitution have their limits. Freedom of movement can be restricted by a state to enforce its quarantine laws, to prevent an individual from leaving the state to avoid an

obligation in a law suit through the ancient writ of *ne exeat*, and to require an individual to remain in the state to give testimony in a criminal prosecution in which he is a material witness; in this latter case he may be taken into protective custody prior to trial. One must conclude that reasonable interference with freedom of movement is valid. The question then in the instant case is whether the witness O'Neill would be restricted unreasonably if he was taken into custody in Florida and removed to New York to give testimony in a criminal proceeding or grand jury investigation.

All would agree that the Constitution of the United States has created a nation. The administration of criminal justice in one state affects the fabric of the nation. Recent Congressional investigations have dramatized the interstate character of crime in the United States and the high degree of mobility of criminals and their associates. It is therefore important to the nation that methods be found effectively to eradicate or minimize criminal action without unduly interfering with the right to move freely from state to state. The states must be able to cooperate to enforce their criminal laws.

(a) Freedom from giving testimony in a criminal proceeding is not a privilege or immunity of United States citizenship. The citizen has obligations as well as privileges which attach to his citizenship. A citizen of the United States residing permanently out of the country may be required to return to the United States to testify in a federal court in a criminal proceeding. *Blackmer* v. *United States*, 284 U.S. 421. This is true even though service of process was made outside the jurisdiction of the United States by a member of the consular staff. Although in this situation the United States Court may lack power in the physical sense to return the individual to the country,

it was held to have power to cite the witness for contempt for failure to respond to the subpoena and to attach property in this country to pay the fine levied for the contempt.

If the United States can compel a witness to return to testify, then his freedom of movement is not guaranteed as a privilege or immunity of United States citizenship. On the contrary, his obligation to testify stems from that same citizenship.

It is urged that the states by reciprocal legislation can constitutionally require testimony in a requesting state. In the instant case the witness O'Neill was served with process in Florida and was brought before the Florida court so that the jurisdiction was founded on physical presence. To issue the requested order is not to act extra-territorially. The Florida order acts only on the witness in Florida.

(b) The Congress has recognized the need to aid the states in returning alleged criminals or witnesses who leave the state, by passing the Fleeing Felon and Witness Act, Section 1073, Title 18, U.S. Code. In this act the Congress has made it a crime for a witness to leave a state to avoid prosecution or custody or confinement for a crime therein, or to avoid giving testimony in any criminal proceedings in the state if a felony is charged. It is significant that the venue for the federal crime is laid in the federal judicial district in which the original crime was alleged to have been committed. The Congress has thus used the commerce power "to aid the states in the apprehension of the guilty and make certain, swift, and sure the punishment of those who commit crimes against the states." *United States* v. *Miller,* 17 F. Supp. 65, 68. The constitutionality of this act was sustained in a case in which a witness was subpoenaed to appear before a one-man grand jury. *Hemans* v. *United States,* 163 F. 2d 228.

If the Congress can constitutionally create a crime under the commerce clause for the purpose of returning an alleged felon or a witness in a criminal proceeding to the state where the original crime was committed, there should be no constitutional barrier to reciprocal action by the several states on principles of comity which would accomplish the same result. This is a reasonable interference with the right of free movement between the states.

(c) Assuming that the state may have the power to require a witness to go into another state to give testimony in the criminal proceedings, the Florida Act, Sections 942.01-942.06, Florida Statutes 1955, which is the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, is a reasonable method of exercising the power. In the first place the Court may issue the order only after adequate notice has been given the witness within the state of Florida and a hearing has been held. At all times the witness is entitled to counsel. At the hearing the judge must determine (1) that the witness is material and necessary, (2) that it will not cause undue hardship to the witness to be compelled to attend and testify in the requesting state, (3) that the proceeding has begun or is about to begin, and (4) that he will be given immunity from the service of civil and criminal process while in the requesting state. Further, the requesting state must pay or tender to the witness in advance the transportation costs and witness fees. It is to be noted that there must be an affirmative finding of fact that the attendance *will not cause undue hardship to the witness.*

If the judge finds it will not cause undue hardship to the witness to attend, and if the proceeding is about to begin, it is reasonable to take the witness into custody to be delivered to an officer of the requesting state.

(d) The privileges and immunities clause of the Fourteenth Amendment has had an unusual history. A diligent search of the cases arising under the clause revealed only one in which this Court held state action unconstitutional. In the case of *Colgate* v. *Harvey*, 296 U.S. 404, a Vermont income tax was invalidated because it taxed income from money loaned outside the state and exempted income from loans made within the state. This was held to violate the privileges and immunities clause, as well as the equal protection clause, of the Fourteenth Amendment. Mr. Justice Stone, dissenting in the case, wrote as follows:

> "In no case since the adoption of the Fourteenth Amendment has the privileges and immunities clause been held to afford any protection to movements of persons across state lines or other form of interstate transaction.
>
> "The reason for this reluctance to enlarge the scope of the clause has been well understood since the decision of the *Slaughter-House Cases, supra.* If its restraint upon state action were extended more than is needful to protect relationships between the citizen and the national government, and it did more than duplicate the protection of liberty and property secured to persons and citizens by the other provisions of the Constitution, it would enlarge judicial control of state action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter-House Cases, supra,* with the decision against the enlargement. Since the adoption of the Fourteenth Amendment at least forty-four cases have been brought to this Court in which state statutes have been assailed as infringements of the privileges and immunities clause. Until today none has held that state legislation infringed that clause." *Colgate* v. *Harvey,* 296 U.S. 404, 445-446.

Justice Stone's view was supported by a majority of the Court four years later in *Madden* v. *Kentucky*, 309 U.S. 83, 93, in this language:

> "Appellant relies upon *Colgate* v. *Harvey* as a precedent to support his argument that the present statute is not within the limits of permissible classification and violates the privileges and immunities clause. In view of our conclusions, we look upon the decision in that case as repugnant to the line of reasoning adopted here. As a consequence, *Colgate* v. *Harvey* must be and is overruled."

Although two justices relied on the privileges and immunities clause of the Fourteenth Amendment to decide *Hague* v. *C.I.O.*, 307 U.S. 496, and the concurring judges in *Edwards* v. *California*, 314 U.S. 160, preferred to place the decision in that case on the clause, the results in those two cases were reached by reference to other clauses in the Constitution. The fact that only one state act has been invalidated by reference to the clause and that case has been expressly overruled leads to the conclusion that the clause states in broad language constitutional rights specifically protected by other provisions of the United States Constitution.

The clause does not invalidate the statute in this case which requires a witness to testify in a criminal proceeding in another state.

CONCLUSION.

1. Section 942.02 of Florida Statutes 1955 is not unconstitutional under the privileges and immunities clause of Article IV, Section 2.

2. The Act is not invalidated by the negative implications of the extradition clause of the same section.

3. The Act does not deprive the witness O'Neill of a privilege or immunity guaranteed to United States citizens by the Fourteenth Amendment.

We therefore respectfully request that the judgment of the Florida court be reversed and the cause be remanded for further proceedings.

Respectfully submitted,

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